

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY RAINES and DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS, Dallas, TX

*Docket No. 02-772; Submitted on the Record;
Issued September 26, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of \$2,752.84 since she no longer had any dependents from August 27, 1999 through April 21, 2001, but continued to be paid compensation at the augmented rate instead of the basic rate; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; and (3) whether the Office properly withheld \$30.00 every four weeks from appellant's continuing compensation to recover the overpayment.

On May 7, 1980 appellant, then a 28-year-old census enumerator, filed a notice of traumatic injury claiming that on May 6, 1980 she was involved in a motor vehicle accident in the performance of duty. The Office accepted appellant's claim for a crushed left hand with amputation of the left thumb and appellant received a schedule award for 66 percent permanent impairment of the left arm.

By decision dated July 31, 2001, the Office made a preliminary finding that appellant was overpaid benefits in the amount of \$2,752.84 since she no longer had any dependents from August 27, 1999 through April 21, 2001, but continued to be paid compensation at the augmented rate instead of the basic rate. The Office found that appellant was without fault in creating the overpayment.¹

By decision dated September 6, 2001, the Office notified appellant that the preliminary finding of the \$2,752.84 overpayment was made final. Appellant did not request a waiver of the

¹ The Office also made a preliminary finding on August 10, 2001 that appellant had been overpaid benefits in the amount of \$1,765.15 during the period April 26, 1998 through August 26, 1999, when she was entitled to \$309.00 every four weeks instead of \$412.00 every four weeks. The Board notes that the preliminary finding was never finalized and there is no formal Office decision regarding the overpayment in the record. Since appellant is appealing the July 31, 2001 overpayment in the amount of \$2,752.84, the Board will only address this overpayment.

overpayment and did not submit a financial statement within 30 days of the Office's August 10, 2001 letter. The Office advised appellant that the sum of \$30.00, which equates to 10 percent of appellant's new compensation entitlement, would be deducted from her compensation until the total amount of the overpayment and interest was recovered. The Office noted that should appellant submit her financial statement at a later time, further consideration would be given in either reducing or increasing the amount of recovery.

The Board finds that appellant received an overpayment in the amount of \$2,752.84.

The Office found in its July 31, 2001 preliminary decision, that appellant received an overpayment in the amount of \$2,752.84 from August 27, 1999 through April 21, 2001, because she was paid the augmented rate of 75 percent instead of the basic rate of 66 2/3 percent, the rate of pay if she had no qualifying dependents. Appellant submitted information to the Office indicating that she separated from her husband on August 27, 1999 and at that time also had no dependents. The Office explained to appellant in a July 13, 1990 letter, that the basic rate of compensation is 66 2/3 percent of the applicable pay rate if she has no eligible dependents and 75 percent if one or more dependents is eligible for compensation. The Office further explained that a spouse may be claimed as a dependent but must be a member of appellant's household. Since appellant informed the Office that she was separated from her husband on August 27, 1999 and had no other dependants at that time, appellant was no longer entitled to the pay rate of 75 percent as of that date. Since she was paid the pay rate of 75 percent from August 27, 1999 through April 21, 2001, the date the Office corrected the error, an overpayment of \$2,752.84 was created. Further, appellant does not refute the fact of an overpayment and there is no evidence to the contrary. She only expressed her lack of understanding of why her divorce was a factor in determining her rate of pay. As noted earlier, the Office explained in their July 1990 letter and in subsequent letters that if appellant no longer had any eligible dependents her rate of pay would be the basic rate of 66 2/3 percent.

The Board further finds that the Office properly found that appellant was without fault in the creation of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act² provides that an overpayment of compensation shall be recovered by the Office unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience.³ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁴

The implementing regulation⁵ provides that a claimant is with fault in the creation of an overpayment when she: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which

² 5 U.S.C. § 8129(b).

³ *Philip G. Arcadipane*, Docket No.95-1024 (issued June 6, 1997).

⁴ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁵ 20 C.F.R. § 10.433(a).

the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.

The evidence establishes that the overpayment occurred because the Office paid appellant compensation at an incorrect rate from August 27, 1999 through April 21, 2001. Appellant did not know and had no reason to know that the rate of payment was incorrect. Appellant continually informed the Office from 1990 to 2001, whether or not she had dependents, their ages and whether their dependency status had changed. The Office found that appellant was not at fault in creating the overpayment and that the Office itself failed to take timely action in reducing appellant's compensation rate after they knew her dependency status had changed. Since appellant did not make any incorrect statements of material fact to the Office and regularly informed the Office whether or not she had dependents, appellant was without fault in creating the overpayment.

The Board also finds that the Office properly determined to recover the overpayment by withholding \$30.00 per month from appellant's continuing compensation benefits.

Section 10.441(a) states in pertinent part: "When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship."⁶

In this case, the Office stated in its July 31, 2001 preliminary decision, that appellant could request a waiver of the overpayment and submit supporting financial documents, including income tax returns, bank account statements, bills and cancelled checks, pay slips and other records to support income and expenses shown on Form OWCP-20, so the Office could determine whether a request for waiver could be granted or determine how much should be recovered. She did not request a waiver of the overpayment. Appellant did submit a Form OWCP-20 but did not fill in any financial information. She mentioned in a letter received on April 25, 2001 that she had enclosed a bank form with her correspondence yet no such statement was received. In a letter dated November 18, 2001, appellant stated that the \$30.00 monthly reduction "really hurts" since she has no savings and no other income, however, appellant did not provide any financial evidence to support her contention that \$30.00 a month was unreasonable. Since the Office did not receive a waiver request from appellant or any financial information, the Office determined that 10 percent of appellant's net compensation, or \$30.00 per month, was a reasonable amount to be deducted from her continuing compensation until the total amount of the overpayment was recovered. Appellant did not submit any financial information or other evidence to show that \$30.00 per month was an unreasonable amount for the Office to withhold to recover the overpayment. The Office also noted that should appellant submit a financial statement at a later date, further consideration would be given either in reducing or increasing the amount of the recovery. The Board finds that since appellant did not

⁶ 20 C.F.R. § 10.441(a).

request a waiver of the recovery of the overpayment and did not submit any financial information, the Office did not abuse its discretion in determining that 10 percent of appellant's continuing compensation, or \$30.00 per month, was a reasonable amount in recovering the overpayment.

The September 6, August 10 and July 31, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 26, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member